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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 266

ALI MONEM,

Petitioner,

—against—

COSMOPOLITAN SHIPPING CO., INC., HILLCONE STEAMSHIP CO. INC. and MARITIME TRANSPORTATION COMPANY,

Respondents.

BRIEF OF RESPONDENTS COSMOPOLITAN SHIPPING CO., INC., HILLCONE STEAMSHIP CO. INC. AND MARITIME TRANSPORTATION CO. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RICHARD L. MAHER
On the Brief

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JURISDICTION

This action was originally commenced in the Municipal Court of the City of New York, Borough of Manhattan, First District, an inferior Court of the State of New York. Appeals from the judgments of that Court are to the Appellate Term of the Supreme Court of the State of New York. Thereafter an application may be made to the Appellate Division of the Supreme Court for leave to appeal to that Court from the determination of Appellate Term. If the Appellate Division denies leave to appeal to it from the determination of the Appellate Term, the Court of Appeals, the Court of last resort in the State of New York, lacks jurisdiction to entertain a motion for leave to appeal to it under Section 589 1(b) of the Civil Practice Act.

Franklin Simon & Company v. *Pease & Elliman*, 262 N. Y. 693;
Allen v. *Hungarian Mothers' Club, Inc.*, 283 N. Y. 698;
Nash v. *Lang*, 300 N. Y. 626;
Baum v. *Crosfield*, 304 N. Y. 732;
Carey v. *Pell, DeVegh & Company, Inc., et al.*, 304 N. Y. 733.
Basil v. *City of New York et al.*, 7 N. Y. 2nd 964;

The petition for certiorari was not filed within ninety days from the entry of judgment of the Appellate Term of the Supreme Court of the State of New York. The Appellate Term is the highest Court of the State of New York in which a decision could be rendered in the instant case. The Appellate Division is the highest court in New York which would have even discretionary jurisdiction. The petition was not filed within the time prescribed from the judgment of the Appellate Term or even from that of the Appellate Division.

The motion made by petitioner for leave to appeal to the Court of Appeals of the State of New York which has no jurisdiction to review the determination of an inferior court does not toll the limitation of time to file the petition for a writ.

Western Union Telegraph Company v. *Hughes*, 203 U. S. 505;
Gypsy Oil Company v. *Leo Bennett Escoe*, 275 U. S. 498;
Department of Banking v. *Pink*, 317 U. S. 264;
Matton Steamboat Co., Inc. et al., v. *Murphy Acting Industrial Commissioner, et al.*, 319 U. S. 412;
Cole v. *Violette*, 319 U. S. 581;

Federal Trade Commission v. *Minneapolis-Honeywell Regulator Company*, 344 U. S. 206.

The petition should be denied on jurisdictional grounds under Title 28 U. S. C. 1257, 2101.

PROCEEDINGS IN THE COURTS BELOW

Petitioner brought his action in the Municipal Court of the City of New York to recover a sum claimed to be due for maintenance in excess of the amount previously paid to him by the owners of the s/s Cornell. The case came on to be heard before a Judge without a jury. The trial was protracted and occupied several days. The Presiding Judge after hearing the conflicting testimony of doctors, who examined petitioner, and examining medical reports of the United States Public Health Service submitted by petitioner as exhibits in support of his claim, found as a fact that petitioner had received the maintenance due him and entered judgment in favor of respondents. Judgment was entered on February 7, 1961.

The Appellate Term of the Supreme Court of the State of New York, First Department, affirmed the aforementioned judgment on June 15, 1961 without opinion.

Thereafter, a motion was made by petitioner in the Appellate Term for leave to appeal to the Appellate Division of the State of New York, First Department. This motion was denied by an order of the Appellate Term entered on July 27, 1961.

Petitioner then made a motion pursuant to Section 623, New York Civil Practice Act in the Appellate Division of the Supreme Court of the State of New York, First Department for leave to appeal to that Court, which motion was denied by an order entered October 24, 1961.

Petitioner then moved in the Appellate Division for leave to appeal to the Court of Appeals of the State of New York which was denied by said Appellate Division by order entered December 14, 1961.

Thereafter, petitioner brought on a motion to the Court of Appeals of the State of New York for leave to appeal to that Court, which motion was denied by the Court of Appeals on the grounds that it lacked jurisdiction to entertain such a motion pursuant to the Civil Practice Act of the State of New York (Civil Practice Act, § 589, Subd. 1[b]).

Petitioner does not here seek relief from the determination of the Court of Appeals of the State of New York and, in so doing must be deemed to concur with the determination of that Court that it lacked jurisdiction to entertain an appeal in this matter commenced in the Municipal Court of the City of New York.

The opening statement in petitioner's brief is that he prays for a writ to review the judgment of the Appellate Term of the Supreme Court of the State of New York, First Department, entered on June 15, 1961. It is evident from this statement that petitioner realizes that the time to petition has expired.

POINT I

PETITIONER DID NOT CLAIM IN THE COURTS BELOW THAT THERE WAS A FEDERAL QUESTION. THERE WAS NO IMPORTANT FEDERAL QUESTION, THERE WAS ONLY A QUESTION OF FACT, THE PETITION DOES NOT WARRANT REVIEW BY THIS COURT.

No Federal issue was raised in the Trial Court. No determination was made by the Appellate Term of the Supreme Court of the State of New York that involved a

Federal question upon its affirmance of the factual determination of the Trial Court.

There has never been any doubt that a seaman may, if the facts warrant, receive maintenance even if he had at one time been declared fit for duty. This is a common occurence and is handled as such by employers and the Courts. The right to maintenance depends on the facts and here the facts were decided against petitioner. There is no conflict between the decision of the Federal and State Courts on the rights of a seaman to obtain maintenance.

In addition to the foregoing it has been held by this Court that if a Federal question is to be argued it must have been presented to the Court below, and the decision of the Federal question must have been necessary to the determination.

Zucht v. *King et al.*, 260 U. S. 174;
Lynch et al. v. *New York*, 293 U. S. 52;
McGoldrick v. *Gulf Oil Corp.*, 309 U. S. 2.
Charleston Federal Savings & Loan Assoc. et al. v. *Alderson*, 324 U. S. 182;
Durey v. *Mayo*, 351 U. S. 277;

As stated earlier there was only a question of medical fact whether or not petitioner was fit for duty. This was resolved against petitioner by the trial court.

CONCLUSION

The Petition Should be Denied.

Respectfully submitted,

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80 Broad Street,
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